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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X
SECURITIES INVESTOR PROTECTION
CORPORATION,

Plaintiff-Applicant,

-against-

BERNARD L. MADOFF INVESTMENT
SECURITIES LLC,

Defendant.

-----X
In re:

BERNARD L. MADOFF,

Debtor.
-----X

Adv. Pro. No. 08-01789 (SMB)

SIPA LIQUIDATION

(Substantively Consolidated)

**REPLY MEMORANDUM OF LAW OF KHRONOS LLC
IN FURTHER SUPPORT OF ITS MOTION TO QUASH
THE TRUSTEE'S FED. R. BANKR. P. 2004 SUBPOENA**

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Pursuant to Fed. R. Bankr. P. 2004 and Fed. R. Civ. P. 45, made applicable by Fed. R. Bankr. P. 9016, Khronos LLC (“Khronos”) respectfully submits this reply memorandum of law, together with the Supplemental Declaration of Rafael Mayer, dated September 7, 2020 (the “Supplemental Mayer Declaration”), in further support of its motion (the “Motion”) to quash the Subpoena (the “Current Rule 2004 Subpoena”) issued by Irving H. Picard (the “Trustee”), trustee for the liquidation of the business of Bernard L. Madoff Investment Securities LLC (“BLMIS”) under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa, *et seq.*¹

PRELIMINARY STATEMENT

1. The Current Rule 2004 Subpoena serves no proper purpose and thus should be quashed.
2. In his opposition, the Trustee effectively concedes that the Current Rule 2004 Subpoena largely duplicates the requests in his Original 2004 Rule Subpoena. The only non-duplicative area of discovery identified by the Trustee concerns the liquidations of Montpelier International and Prince Assets LDC in 2017 and 2019, respectively. But discovery into these liquidations is plainly beyond the scope of the Trustee’s powers under Rule 2004 because there is no possibility that such discovery would yield information concerning potential claims to recover customer property for the BLMIS estate.
3. The initial Legacy transfers at issue occurred in 2007 and 2008. The Trustee offers absolutely no basis to connect those transfers to foreign liquidations occurring ten and eleven years later. Because there is no prospect that the requested discovery will aid the Trustee in developing potential claims to benefit the BLMIS estate, the Current Rule 2004

¹ Capitalized terms not defined herein shall have the meaning ascribed to them in the Motion (ECF Doc. No. 19704).

Subpoena is improper and should be quashed, and the Trustee's relentless harassment of Khronos through both litigation and subpoenas should be brought to an end.

4. The Trustee's last-ditch effort to seek a second round of Rule 2004 discovery from Khronos is a product of the Trustee's lack of diligence and lack of attention to the discovery he obtained from Khronos' files a decade ago. Contrary to the Trustee's unsupported insinuations, Khronos has at all times been straightforward with the Trustee. Khronos complied with the Original Rule 2004 Subpoenas and then endured the Trustee's lawsuit against it, which was dismissed with prejudice, after over five years of litigation and great expense and reputational harm. It is an abuse of process for the Trustee to attempt to subject Khronos to yet another round of discovery related to a case from which it was dismissed on the merits, when the Trustee's claimed urgent need for such discovery arises from his own delay and neglect of information in his possession, and when the discovery sought cannot possibly give rise to a viable subsequent transferee claim for the benefit of the BLMIS estate.

5. In opposing Khronos' motion to quash, the Trustee does not dispute that the alleged subsequent transfers from Legacy to Montpellier International and Prince Assets LDC in 2007 and 2008, respectively, were identified in the documents produced to the Trustee by Khronos a decade ago in response to the Original Rule 2004 Subpoenas. It appears that the Trustee never bothered to look at the information that had been produced to him.

6. The Trustee also does not dispute that he never sued or threatened to sue Montpellier International or Prince Assets LDC, even though, if he believed in good faith that he had potentially viable claims against them, he has had many years to pursue those claims or at least to identify the claims. Based on publicly available notices attached to the Declaration of Jason S. Oliver in Opposition to Khronos' Motion, ECF Doc. No. 19752 (the "Oliver

Declaration”), the Trustee acknowledges that both Montpelier International and Prince Assets LDC were liquidated in accordance with Bermuda and Cayman law, respectively. In both cases, the dissolution of these entities occurred many years after the transfers that the Trustee is now inquiring about. And in both instances, according to the face of the notices attached to the Oliver Declaration, the liquidation of these entities expunged any claims not asserted against those entities.

7. The Trustee claims that he is deploying Rule 2004 discovery to try to identify a subsequent transferee he can sue before November because he only just recently learned for the first time in post-judgment discovery that Legacy lacks assets to satisfy the judgment against it. The Trustee’s assertion is utter nonsense. The Trustee himself alleged correctly in his complaint back in 2010, based on information produced by Khronos in response to the Original Rule 2004 Subpoenas, that Legacy’s only asset was its account with BLMIS. Legacy’s lack of assets is not news to the Trustee, even though he tells the Court that it is. The Trustee has had more than a decade to consider the fact that Legacy has lacked any meaningful assets since the collapse of BLMIS in December 2008.

8. Certainly, the Trustee has broad powers under Rule 2004. But those powers are not limitless and are subject to the Court’s supervision. Here, the Trustee’s subpoena is an unwarranted attempt at a “do over” of its previous Rule 2004 subpoenas seeking Khronos’ files. The current subpoena’s requests are an incoherent effort to obtain irrelevant, voluminous information for an unspecified period of time, because the subpoena does not even specify a time period. Beyond the burdens and redundancies and unfairness of it all, these discovery requests serve no legitimate purpose, as it is absurd for the Trustee to posit that he can trace transfers that

date back to 2007 through more than a decade of transactions and then beyond the dissolution of these foreign funds.

ARGUMENT

I. THE SUBPOENA SHOULD BE QUASHED FOR LACK OF GOOD CAUSE

9. The Current Rule 2004 Subpoena should be quashed because the Trustee has failed to meet his burden to show that there is good cause for the subpoena. *See* Mot. at 5.

10. The Opposition simply ignores, and thus concedes, that the vast majority of requests in the Current Rule 2004 Subpoena are duplicative of requests that the Trustee made in his Original Rule 2004 Subpoenas. In response to Khronos' argument that the Current Rule 2004 Subpoena is duplicative of the Original Rule 2004 Subpoenas, the Trustee says only that he "did not intend to duplicate discovery efforts" and belatedly proposes to narrow the subpoena, claiming that the Current Rule 2004 Subpoena "principally relate[s] to the foreign liquidations of Montpelier and Prince and the nature and extent of any further subsequent transfers of BLMIS customer property." Opp. at 5.²

11. The Trustee claims that information relating to the liquidation of Prince Assets LDC and Montpelier International is necessary to determine "the scope of his potential claims" and to establish "any recovery claims he may have" against Prince Assets LDC, Montpelier International, or investors that redeemed investments in connection with the liquidations. Opp. at 8. The Trustee has failed to establish good cause for discovery relating to these liquidations.

² If the Trustee was prepared all along to narrow the Current Rule 2004 Subpoena to information about these two foreign fund liquidations, he should have made that proposal during the parties' meet-and-confer process and not in a court filing after Khronos moved to quash. In any event, to the extent that the Current Rule 2004 Subpoena duplicates the requests in the Original Rule 2004 Subpoena, all those requests should be quashed. *See In re Brown*, No. 18-10617-JLG, 2018 WL 4944816, at *3 (Bankr. S.D.N.Y. Oct. 11, 2018); *In re Texaco, Inc.*, 79 B.R. 551, 553 (Bankr. S.D.N.Y. 1987).

12. Any distributions made in connection with the liquidations of Montpellier International and Prince Assets LDC cannot possibly be tied to the Legacy transfers that occurred approximately a decade earlier. Were the Trustee to bring such claims against recipients of the distributions, the Trustee would be required to plead, and prove, that the funds they received originated with the debtor. *Picard v. Legacy Capital Ltd. (In re BLMIS)*, 548 B.R. 13, 36 (Bankr. S.D.N.Y. 2016). Accordingly, the Trustee would need to show that funds from BLMIS were transferred to the alleged subsequent-subsequent-subsequent transferee, *Picard v. Shapiro (In re BLMIS)*, 542 B.R. 100, 119 (Bankr. S.D.N.Y. 2015), and allege the “necessary vital statistics—the who, when, and how much of the transfers to establish that an entity was a subsequent transferee of the funds.” *Id.* (internal quotations omitted); *see also Silverman v. K.E.R.U. Realty Corp. (In re Allou Distribs., Inc.)*, 379 B.R. 5, 31 (Bankr. E.D.N.Y. 2007). Barebones allegations that the funds at issue were transferred to alleged subsequent transferees, without more detail, are insufficient. *Sec. Inv'r Prot. Corp. v. BLMIS*, 531 B.R. 439, 472-74 (Bankr. S.D.N.Y. 2015); *see also In re Allou Distribs., Inc.*, 379 B.R. at 31 (trustee failed to state a claim against investors as alleged subsequent transferees where trustee failed to plead that payouts to investors, and ultimate proceeds from real estate investment, were derived from the original fraudulent transfer); *In re BLMIS*, 542 B.R. at 119 (granting, in part, motion to dismiss where the pleadings did “not tie any initial transfer to any subsequent transfer or Subsequent Transferee”).³

13. Here, the Trustee offers no basis for him to believe that distributions made in the course of foreign fund liquidations in 2017 and 2019 can possibly be traced to initial

³ Any claims also would fail because all transfers from Prince Assets LDC and Montpellier International were made in good faith and in exchange for value, which further prevents the Trustee from articulating the basis for any potentially viable claims relating to the discovery he is seeking.

transfers that occurred so many years earlier. Accordingly, the discovery being sought serves no legitimate purpose and the subpoena should be quashed for lack of good cause.

14. Without citing any facts at all, the Trustee falsely paints a picture of Prince Assets LDC and Montpellier International to make it appear as though they are pass-through entities used to shelter BLMIS transfers for the benefit of Rafael Mayer and David Mayer. In fact, as explained in the Supplemental Mayer Declaration, as of June 2007, when the alleged transfers from Legacy occurred, Montpellier International was a holding company in a larger investment fund complex that operated as a fund-of-funds (the “Montpellier Group”); as of June 2007, the date of the alleged transfers from Legacy, the Montpellier Group’s portfolio had a value in excess of \$3 billion, which was invested on behalf of more than 400 investors; the Montpellier Group invested worldwide in numerous investments, and among those investments, the allocation to Legacy represented less than 2.5% of the Montpellier Group’s total portfolio value. Supp. Mayer Decl. ¶¶ 3-4. The Montpellier Group companies were audited annually and administered by third party firms, and supervised by independent directors. *Id.* ¶ 5. The Montpellier Group operated with a \$600 million line of credit from two top European banks. *Id.* Thus, it is frivolous for the Trustee to suggest that investors in Montpellier Group received distributions in 2017 that are traceable to alleged transfers that occurred ten years earlier.⁴ Again, there is no possibility that the Trustee has viable claims against investors that received liquidation distributions in good faith, many years after the initial BLMIS transfers at issue, from a substantial fund with diversified investments of which Legacy’s investment in BLMIS represented a tiny fraction of the overall portfolio. Thus, the Current Rule 2004 Subpoena

⁴ The Trustee’s arguments as to Prince Assets LDC are similarly frivolous. However, as explained, Khronos ceased managing Prince Assets LDC at the end of 2015 and, accordingly, lacks authorization to provide detailed information about that fund. Mayer Decl. ¶ 5.

should be quashed for lack of good cause because the Trustee has no legitimate interest in the information he seeks.

15. The Trustee's extraordinary delay in inquiring about Prince Assets LDC and Montpellier International further demonstrates that the Trustee is now desperately grasping at straws and is not engaged in an appropriate use of his Rule 2004 subpoena powers. The Trustee does not dispute that since at least 2010, when Khronos' files were produced to the Trustee, the Trustee has had all necessary information to identify Prince Assets LDC and Montpellier International as entities that allegedly received funds from Legacy. Opp. at 13 (noting that "Khronos and the Mayers produced documents in 2010 to the Trustee indicating that Prince and Montpellier redeemed shares from Legacy"). Yet the Trustee has never asserted any claims, or threatened to assert any claims, against those entities, even though he named numerous alleged subsequent transferee defendants in the Legacy Adversary Proceeding, including Khronos, Rafael Mayer, David Mayer and others. *See Picard v. Legacy Capital Ltd. (In re BLMIS)*, No. 10-05286 (SMB), ECF Doc. No. 1 (Legacy Adversary Proceeding Compl.). The Trustee cannot now claim that he needs additional discovery to determine whether he has potential claims against investors in Prince Assets LDC and Montpellier International, entities that dissolved many years after the transfers in question, when he never followed up on the Original Rule 2004 Subpoenas and has never before asserted or threatened claims against Prince Assets LDC or Montpellier International. *Cf. Sec. Inv'r Prot. Corp. v. BLMIS*, 590 B.R. 200, 210 (Bankr. S.D.N.Y. 2018) (denying Trustee's request for expedited discovery of matters subject to prior Rule 2004 discovery).⁵

⁵ The Trustee claims *Securities Investor Protection Corp. v. BLMIS* is distinguishable in that it did not involve a Rule 2004 subpoena, but as the Court noted, the Trustee's discovery requests at issue in that case were similar to pre-litigation discovery under Rule 2004. *Id.* at 208. Here, like that case, the Trustee

16. The Trustee's Opposition also fails to address the fact that the certificates of dissolution for Montpellier International and Prince Assets LDC, which the Trustee attaches to his declaration in opposition to the Motion, expunge all claims against those entities. *See* Oliver Decl. Ex. 2 at 4 & Ex. 3 at 2. The Trustee does not dispute the validity of the liquidation proceedings under Bermuda or Cayman law, and the Trustee had no trouble locating the public notices for the two funds' respective liquidations. The Trustee has not presented any argument to overcome the expungement of any potential claims that he claims to have had against Prince Assets LDC and Montpellier International. Accordingly, as already argued above, there is no legitimate basis for the discovery sought, and the Current Rule 2004 Subpoena lacks good cause and should be quashed. There simply is no conceivable way to tie distributions made to investors from large, diversified investment funds in 2017 and 2019, respectively, back through ten and eleven years of transactions to alleged transfers from Legacy that occurred in 2007 and 2008. And even if, for the sake of argument, the transfers could be traced, there is no basis to assert that investors who received distributions upon liquidation did not receive those distributions in good faith and for value. Further, even if potentially viable claims existed, they have been expunged. Without describing a potentially legitimate basis for bringing future subsequent-subsequent-subsequent transferee claims against investors in Prince Assets LDC and Montpellier International for distributions received when those funds liquidated, the Trustee cannot establish good cause for the discovery he seeks and the subpoena should be quashed. *In re AOG Entm't, Inc.*, 558 B.R. 98, 108 (Bankr. S.D.N.Y. 2016).

belatedly seeks to supplement Rule 2004 discovery taken years ago.

II. KHRONOS DOES NOT HAVE CUSTODY, POSSESSION OR CONTROL OVER PRINCE ASSETS LDC'S INFORMATION

17. Even if discovery into the liquidations served some legitimate purpose, the Current Rule 2004 Subpoena seeks information from Khronos that Khronos does not have in its custody, possession or control. Again, Khronos informed the Trustee in its August 6, 2020 letter that Khronos no longer provides services to Prince Assets LDC; and, as a result, Khronos is not in possession, custody or control of Prince Assets LDC's information. *See* Fisher Decl. Ex. C. Khronos ceased providing services to Prince Assets LDC or any affiliate thereof on December 31, 2015, well prior to the liquidation of Prince Assets LDC and nearly five years before the Trustee served the Current Rule 2004 Subpoena. *See id.* That the Trustee continues to press forward with his requests relating to Prince Assets LDC, even after Khronos has informed him that it does not possess such information, is further evidence of the Trustee's improper and harassing tactics against Khronos.⁶ If the Trustee believes he is genuinely entitled to documents about Prince Assets LDC's liquidation, he must seek those documents from Prince Assets LDC or potentially from the entity that served as its administrator from January 1, 2016 through its dissolution in 2019.

18. The Trustee's baseless innuendo that Khronos destroyed documents related to Prince Assets LDC is false. Khronos did not destroy Prince Assets LDC's documents; rather, access to and control of all such information was turned over to a new administrator several years ago.⁷ *See* Mayer Decl. ¶ 5.

⁶ *In re Arkin-Medo, Inc.*, 44 B.R. 138 (Bankr. S.D.N.Y. 1984), is inapposite. The subpoenaed creditor argued that it did not have knowledge of the debtor's reorganization or financial affairs, not that it did not have information concerning the more specific subject matter of the Rule 2004 subpoena, which sought information concerning the creditor's claim. *Id.* at 139-40. Moreover, unlike here, the creditor in *In re Arkin-Medo, Inc.* had not previously produced any files to the debtor. *Id.* at 140.

⁷ *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 138 (2d Cir. 2007), is irrelevant, as the

III. THE CURRENT RULE 2004 SUBPOENA OVERLAPS SUBSTANTIALLY WITH THE CLAIMS IN THE LEGACY ADVERSARY PROCEEDING

19. The Trustee claims that the Legacy Adversary Proceeding is not relevant to the Current Rule 2004 Subpoena and that the pending proceeding rule does not apply, because Khronos was dismissed from the action and judgment was entered against Legacy. *See Opp.* at 9. As the Trustee acknowledges, the purpose of the pending proceeding rule is to prevent parties from circumventing the procedural safeguards afforded under the Federal Rules of Civil Procedure. *See Opp.* at 9. But the Trustee fails to acknowledge that in the Legacy Adversary Proceeding, he asserted claims against Khronos relating to the exact alleged transfers as to which the Trustee now seeks his second round of discovery. Again, the Trustee seems to think that his subpoena relates only to the liquidation of Prince Assets LDC and Montpellier International, and he ignores that the Current Rule 2004 Subpoena demands that Khronos produce all documents relating to any “Subsequent Transfer” from Legacy, which presumably would include the alleged transfers that formed the basis of the Trustee’s claims against Khronos and that remain the subject of a pending appeal before the Second Circuit.⁸

discovery in that proceeding concerned requests served on an individual, the plaintiff, seeking corporate documents from an entity that the plaintiff allegedly controlled. *Id.* at 138-39. Here, the Current Rule 2004 Subpoena is directed to Khronos; Khronos does not have possession or control of documents of its officers or directors unrelated to their roles with Khronos.

⁸ The Trustee’s argument that the pending proceeding rule should not apply because the Trustee does not currently have the ability to seek discovery under the Federal Rules ignores both that the Trustee could have sought discovery during the Legacy Adversary Proceeding, but chose not to, and that the Legacy Adversary Proceeding is subject to a pending appeal that could result in additional discovery in the event the decision is overturned. The single case from this District cited by the Trustee in support of his argument is inapposite and ultimately substantially narrowed the Rule 2004 subpoenas. *In re Glitnir banki hf.*, No. 08-14757 (SMB), 2011 WL 3652764, at 5-11 (Bankr. S.D.N.Y. Aug. 19, 2011). The cases cited by the Trustee from other districts are neither binding on this Court nor persuasive, as they are factually distinguishable and concern discovery unrelated to their respective pending proceedings. *In re Brooke Corp.*, No. 08-22786, 2013 WL 3948866, at *3 (Bankr. D. Kan. July 29, 2013) (subpoenaed parties were not party to pending adversary proceedings); *In re Washington Mut., Inc.*, 408 B.R. 45, 52-53 (Bankr. D. Del. 2009) (overlap in discovery was limited to “a single alleged fact” and subpoenaed party could not rely on pending proceeding to which it was not a party); *Secs. Inv’r Prot. Corp. v. Cont’l*

NOTICE

20. Notice of this Reply, together with the Supplemental Mayer Declaration, will be provided by email or U.S. Mail to the Trustee and all parties included in the Master Service List as defined in the Order Establishing Notice Procedures (ECF Doc. No. 4560).

CONCLUSION

WHEREFORE, Khronos respectfully requests that the Court enter an order substantially in the form of the Proposed Order attached as Exhibit A to the Motion, quashing the Current Rule 2004 Subpoena in its entirety, and granting such other and further relief as the Court deems just and proper.

Dated: New York, New York
September 7, 2020

Respectfully submitted,

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Capital Inv. Servs., Inc. (In re Cont'l Capital Inv. Servs., Inc.), No. 03-3370, 2009 WL 1604703, at *2 (Bankr. N.D. Ohio Mar. 6, 2009) (Rule 2004 subpoena sought information that party objected to and refused to produce in adversary proceeding); *In re Int'l Fibercom, Inc.*, 283 B.R. 290, 292 (Bankr. D. Ariz. 2002) (party not subject to prior discovery by the debtor).